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No. 90-792

In the Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

vs.

UNITED STATES, SAVE SAN FRANCISCO BAY ASSOCIATION, NATIONAL AUDUBON SOCIETY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAVE SAN FRANCISCO BAY ASSOCIATION AND NATIONAL AUDUBON SOCIETY

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QUESTIONS PRESENTED

1. Whether this case is ripe for adjudication by this Court where the Ninth Circuit's ruling is interlocutory and the case has been remanded to the district court to determine the extent to which, if any, the Army Corps has Clean Water Act jurisdiction over a portion of petitioner's Newark Coyote property used by migratory birds and/or endangered species.

2. Whether the Ninth Circuit's holding is correct that, because Congress intended to extend Clean Water Act jurisdiction to all waters the use, degradation or destruction of which may affect interstate commerce, it is proper for the Army Corps to assert jurisdiction over waters which provide habitat for migratory birds and endangered species.

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BRIEF IN OPPOSITION OF RESPONDENTS SAVE SAN FRANCISCO BAY ASSOCIATION AND NATIONAL AUDUBON SOCIETY

The respondents Save San Francisco Bay Association and National Audubon Society respectfully request that this Court deny the petition for writ of certiorari seeking review of the interlocutory opinion of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Respondents Save San Francisco Bay Association and National Audubon Society present the following Statement of the Case to supplement that presented by petitioners Leslie Salt Co. and Cargill, Inc. (hereinafter "petitioner," "Leslie").

Characteristics of Leslie's Newark Coyote Property

The property which is the subject of this lawsuit, known as the Newark Coyote property, consists of 153 acres which is adjacent at its southern end to the Newark Slough, a meandering navigable tidal arm of the San Francisco Bay. District Court Opinion ("DCOP"), *reprinted in* Appendix to Petition at A-19; RT[1] 52, 861; Exh.[2] 733; Exh. 27(b). The property is divided into two parcels, a 10-acre parcel ("Parcel 10") and a 143-acre parcel ("Parcel 143"). *See* Map of Property, Appendix A hereto (which appeared as Appendix A to Respondent U.S.'s Ninth Circuit Opening Brief). The 10-acre parcel is separated from Newark Slough only by a culvert which passes under a road. *Id.* The 143-acre parcel is connected to the Slough by a culvert and a tidal drainage ditch. RT 861; Exh. 734; Exh. 27(b). The Newark Coyote property abuts the 23,000 acre San Francisco Wildlife Refuge, which lies across a road (Thornton Avenue) to the west of the property.

Tidal waters inundate the southern portions of both parcels during high tides that occur on the order of once or twice a month. Ninth Circuit Opinion ("OPIN"), *reprinted in* Appendix

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[1] Citations to RT are to the Reporter's Transcript of the proceedings in the U.S. District Court below and the page number of the Transcript.

[2] Citations to Exh. are to Exhibits submitted in the U.S. District Court below.

to Petition at A-1, 3; Exhs. 733, 715; RT 772, 1088-89, 1127-28, 861, 328-33, 348-49. The Bay tidal waters extend from Newark Slough through the culvert to the southern part of Parcel 10, and across the Wildlife Refuge and through the culvert to the southern part of Parcel 143. As a result of this regular tidal inundation, the southern portions of the two parcels are densely vegetated with pickleweed, a species of salt marsh vegetation. RT 665-66.

The property historically was used for production of salt. RT 108-9. The western two-thirds of Parcel 143 consisted of salt crystallizers. They were constructed by removing the topsoil from the area, using that soil to form a levee around the perimeter of the area, and leveling and compacting the excavated area to form a watertight shallow basin. RT 110. Pits for collecting calcium chloride from the salt brine were constructed on the eastern one-third of Parcel 143. Salt production on the property ceased by the late 1960's. OPIN at A-2; RT 109.

There is ponding in the calcium chloride pits and much of the crystallizers throughout the rainy season (the winter and early spring). RT 575-76, 464, 173, 1715, 667; OPIN at A-2. Some of these areas are "ephemerally ponded," that is, ponded only for a period of days or weeks after rainstorms; other areas are "seasonally ponded," that is, ponded for a period of months throughout the rainy season. Leslie expert Patrick noted that the soil in part of the crystallizer area was saturated for months at a time, and that there was standing water in portions of the crystallizers from November through April. RT 580, 575-76; *see* RT 464. The only reason that he concluded that the area would not qualify as a "wetland" under the Clean Water Act ("CWA") was that it did not have a sufficient plant community (due to the salinity of the soil). RT 580-81.

The calcium chloride pits are particularly aquatic in nature. As petitioner's counsel stated at trial, "They are ponds, which everybody concedes." RT 1715. The testimony indicated that they generally pond water for the major portion of the year (late October to June or July). RT 1483-84.

Most of the plants found in the crystallizers and calcium chloride ponds are obligate wetland species, that is, species that

are found 99% of the time in wetland conditions, and are typically adapted for life in saturated soil conditions. RT 632, 682-88. One of the plants found in the crystallizer furrows and the calcium chloride ponds is "an aquatic plant" that "would only grow in submerged conditions." RT 694, 1215-16. Furthermore, both Leslie and Government experts found evidence of stickleback fish in both the calcium chloride ponds and the crystallizer furrows. RT 677-78, 734, 1181-83 (remains of several hundreds of fish in both crystallizers and calcium chloride pond); OPIN at A-2-3.

More than 59 species of birds have been observed on the property, including numerous species of waterfowl, waterbirds, and water-associated birds. RT 1265-1298; *see also* RT 1239-1262. Fifty-five of those species are birds protected by the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq. RT 1288. Forty of the species found on the site are water or wetland birds. RT 1289.

A table showing the observed bird use of the property in 1983, '85 and '87 shows that large flocks of birds were observed on the property. Exh. 541. Certain areas, including the calcium chloride ponds and portions of the crystallizers, always pond and support waterbird use during the winter-spring months, even in relatively dry years. *See, e.g.,* RT 575-76, 464-65, 173, 1715.

The salt marsh harvest mouse, a rare mouse that lives in the tidal salt marshes around the edges of the San Francisco Bay and its tidal arms, or sloughs, is listed by the United States Fish and Wildlife Service as "endangered" under the Endangered Species Act, 16 U.S.C. section 1531 et seq. Two salt marsh harvest mice were found in the pickleweed area on the southern portion of Parcel 143. RT 1410; Exhs. 558, 651-652. Three additional mice were found on the right of way between Parcel 10 and Thornton Avenue, between one and eleven meters from the property line. RT 1402-10. These mice were living in the southern portion of Parcel 10 and the adjacent right of way. RT 1407.

District Court Opinion

In the trial court, respondents United States and Save San Francisco Bay Association and National Audubon Society argued

that the Army Corps had Clean Water Act jurisdiction over various portions of the Newark Coyote property on several different grounds. Respondents argued that the Corps had jurisdiction over the southern portions of the two parcels on three separate theories: (1) that they were "subject to the ebb and flow of the tide" under 33 C.F.R. § 328.3(a)(1); (2) that they were "adjacent wetlands" under 33 C.F.R. § 328.3(a)(7); and (3) that they were "other waters" subject to Corps jurisdiction under 33 C.F.R. § 328.3(a)(3). Respondents also argued that the Corps had jurisdiction over these portions of the property under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. ("RHA"), because they were subject to the ebb and flow of the tide.

Respondents argued that the Corps had CWA jurisdiction over the crystallizers and calcium chloride ponds on two theories: (1) that these areas were "other waters" subject to Corps jurisdiction under 33 C.F.R. § 328.3(a)(3); and (2) that these areas were "adjacent wetlands" subject to Corps jurisdiction under 33 C.F.R. § 328.3(a)(7). Leslie claimed both that there was no jurisdiction over any part of the property under either the CWA or the RHA and that the Corps was estopped from asserting jurisdiction over the property based on earlier actions taken or not taken by the Corps.

The district court ruled against respondents on all theories of jurisdiction, finding that the Corps had no jurisdiction over any portion of the property under either the CWA or the RHA. The district court found that because Bay tidal water reached the Leslie property as a result of actions taken by state and federal government agencies, that tidal inundation could not be considered in determining whether there was Corps jurisdiction. DCOP at A-29-30. In addition, the district court held that the crystallizers and calcium chloride ponds were not "other waters" because they were artificially created. DCOP at A-32-33. The district court was also apparently troubled by the seasonal nature of the ponding on the crystallizers and calcium chloride ponds. DCOP at A-32. Finally, the district court found that the crystallizers and calcium chloride ponds failed to qualify as "adjacent wetlands" because they did not meet the specific definition of wetlands set forth in the Corps regulations. 33 C.F.R. § 328.3(b). DCOP at

A-39-40. The district court did not reach the estoppel claim raised by Leslie. DCOP at A-40.

Ninth Circuit Opinion

Respondents appealed all aspects of the trial court opinion except the holding that the crystallizers and calcium chloride ponds were not "adjacent wetlands." The Ninth Circuit upheld respondents' appeal. The Ninth Circuit held that the fact that government agencies had caused tidal inundation of the property was not relevant and thus that the Corps did have jurisdiction over the southern portions of the two parcels. Because it found that these portions of the property qualified as "adjacent wetlands," it did not reach respondents' arguments that there was Corps jurisdiction under both the CWA and the RHA due to the ebb and flow of tidal waters. OPIN at A-4, n.5.

The Ninth Circuit did not rule that the crystallizers and calcium chloride ponds were within the Corps "other waters" jurisdiction. Rather than finding Corps jurisdiction over these portions of the property, the court remanded the issue to the district court "to determine if the property has the requisite connections to interstate commerce." OPIN at A-12. The court held only that neither the seasonality of the waters on that part of the property nor the fact that they were artificially created (by Leslie's predecessor) were obstacles to Corps jurisdiction. With respect to migratory birds and endangered species, the court held that the CWA is broad enough to extend Corps jurisdiction to local waters which may provide habitat to migratory birds and endangered species. OPIN at A-12.

Judge Rymer joined in that part of the Ninth Circuit opinion finding CWA jurisdiction over the southern portions of the two parcels. Judge Rymer dissented on the portion of the holding relating to the crystallizers and calcium chloride ponds. Although she agreed with the majority that the seasonal nature of the ponding was not an obstacle to jurisdiction, Judge Rymer opined that these portions of the property should not qualify as "other waters" because she understood that there was "no hydrological connection" between the water in those areas and "any other body of water." OPIN, App. at A-13.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S INTERLOCUTORY DECISION IS NOT RIPE FOR RESOLUTION BY THIS COURT

The interlocutory nature of the Ninth Circuit's ruling makes petitioner's request for certiorari in this case premature. As set forth above, the Ninth Circuit did not find that any part of the crystallizers or calcium chloride pits was subject to CWA "other waters" jurisdiction; it remanded the issue to the district court. OPIN at A-12.

On remand, the district court must make factual determinations regarding migratory bird and endangered species habitat on the property, as well as factual determinations regarding which portions of the property qualify as "waters." If the court finds that there are some waters whose condition affects interstate commerce, the court must then determine how many acres of the property are involved. Alternatively, the district court might decline to reach these issues, holding that the Government is estopped from asserting jurisdiction.

Both the district court's factfinding and its legal analysis will have a great bearing on the appropriateness of granting certiorari. If, for example, the district court were to find that there was CWA jurisdiction over only a one-acre calcium chloride pit that is ponded 9-12 months each year and that supports dozens of species of rare migratory waterbirds, that decision would have a very different meaning than a determination that there was jurisdiction over the entire 100 acres of crystallizers, including parts that never pond for more than a few hours at a time and that only provide potential habitat for non-water-dependent migratory birds. By the same token, the issue posed in Leslie's petition would never arise if the court were to agree with Leslie's estoppel argument.

Denying certiorari now is consistent with the Court's long recognized guiding principle that "by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations."

Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 72 (1961). Thus, the Court has generally disfavored pre-enforcement challenges to regulations allegedly in excess of statutory authority because judicial review "is likely to stand on a much surer footing in the context of a specific application of . . . [a] regulation than could be the case in the framework of . . . [a] generalized challenge. . . ." *Toilet Goods Association v. Gardner,* 387 U.S. 158, 164 (1967). Where, as here, such "surer footing" awaits the outcome of remand proceedings, granting certiorari at the interlocutory stage is premature.

Reviewing the legal issues raised at this stage of the proceedings would only serve as an advisory opinion to guide remand proceedings. The Court has repeatedly refused to issue such advisory opinions on the meaning of a statute or otherwise interpret statutes outside the narrow confines of a particular fact situation:

> "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson v. Buck,* 313 U.S. 387, 402.

Communist Party v. Subversive Activities Control Board, 367 U.S. at 71.

Consistent with its desire to avoid issuing advisory opinions and its preference for deciding legal issues in the context of well-defined fact scenarios, the Court has long held that the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application" for a petition of certiorari. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). *See also American Construction Co. v. Jacksonville, T. & K.W.Ry. Co.,* 148 U.S. 372, 384 (1893). The Court will generally deny a petition for certiorari in a case, such as this one, where the court of appeals has remanded the case to the trial court. *Brotherhood of Locomotive Firemen v. Bangor & A.R.R.,* 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

The Court has rarely shown a willingness to depart from its customary rule of denying review at the interlocutory stage of a case. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. at 258 ("except in extraordinary cases, the writ is not issued until final decree"). The few cases in which the Court has granted certiorari prior to a decision on remand have most often involved the resolution of an important and clearcut issue of constitutional interpretation that is critical to the outcome of the case and that might resolve a conflict with prior decisions of the Supreme Court or another circuit. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945) (certiorari granted at the interlocutory stage to resolve a clear conflict in the federal courts regarding the scope and meaning of the just compensation clause of the Fifth Amendment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (certiorari granted prior to remand to affirm that provisions of abortion law were unconstitutional and in conflict with existing Supreme Court caselaw). However, even the existence of such extraordinary circumstances is no guarantee that certiorari will be granted at the interlocutory stage. *See Michael v. United States*, 454 U.S. 950, 951 (1981) (certiorari denied at the interlocutory stage despite split in circuits over Fourth Amendment question).

Because the Ninth Circuit's ruling has none of the characteristics of those few cases in which certiorari has been granted before remand proceedings, certiorari should be denied here. No constitutional question is raised in this case. While petitioner speculates that the Ninth Circuit's ruling may result in takings claims under the Fifth Amendment (Pet. at 9), no takings claim has been brought.

Nor has petitioner alleged that the Ninth Circuit's holding conflicts with any decisions of the Court or other circuits. Indeed, petitioner can only point to the dissent in the Ninth Circuit opinion and "concerned comments elsewhere." Pet. at 22. A dissenting opinion and "concerned comments" are, alone, no basis for reviewing this interlocutory decision.

Stripped of any pretense that this case raises constitutional issues or involves a conflict among the circuits, it becomes clear that petitioner is making an extraordinary request for interlocu-

tory review in a very ordinary case of statutory construction wherein the court of appeals found that the agency's regulations were not on their face contrary to the CWA. In fact, given judicial deference to the views of the agency charged with administering a statute,[3] this case would not be appropriate for certiorari even if the decision at issue were not interlocutory. This is because certiorari is ordinarily reserved for cases of statutory interpretation involving a judgment that is inconsistent with long-established agency policy. In *Morton v. Ruiz*, 415 U.S. 199, 201 (1974), for example, certiorari was granted "because of the significance of the issue *and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary and of the Bureau*" (emphasis added). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("Riverside Bayview") (certiorari granted because court adopted narrow view of Corps' jurisdiction in conflict with Corps' view); *Chemical Mfrs. Ass'n. v. National Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (certiorari granted when lower court decision challenging agency's statutory interpretation was in direct conflict with earlier decision of another circuit affirming the agency's view).

II

THE DECISION BELOW IS CORRECT; CONGRESS INTENDED THAT CLEAN WATER ACT JURISDICTION REACH AS FAR AS PERMITTED UNDER THE COMMERCE CLAUSE

A. The Ninth Circuit's Decision Is Not Nearly As Broad As Petitioner Claims

Petitioner asserts that the question presented to this Court is "[w]hether the Clean Water Act reaches temporarily wet areas whose 'waters' (a few inches of rainwater ponding only days or

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[3] "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

weeks during the winter season) are neither navigable nor adjacent to, or connected with, any navigable waterbody, and whose claimed link with interstate commerce is solely the presence of migratory birds or endangered species." Petitioner implies that the Ninth Circuit's decision establishes CWA jurisdiction over the many acres of the property which are subject to "ephemeral ponding," which petitioner describes as where there is "standing rainwater a few inches deep in the bottom of the furrows of a plowed field for no more than a few hours at a time." Pet. at 9.

The decision below does no such thing. The only part of the property over which the Ninth Circuit found Corps jurisdiction was the southern portions of Parcels 143 and 10, which are subject to regular tidal inundation by Bay waters. As to the remainder of the property, the appellate court's decision was carefully limited. Declining to find CWA jurisdiction over any of the crystallizers or calcium chloride ponds, the court remanded the case to the district court to determine whether there was any CWA jurisdiction over these portions of the property.

The Ninth Circuit did not hold that "ephemeral ponding" renders a site a "water," nor did it express any opinion as to exactly how wet a site must be to qualify as a "water." It held only that "the seasonal nature of the ponding is no obstacle to Corps jurisdiction," and that the fact that the site was artificially created also does not bar jurisdiction. OPIN at A-9-11. In other words, the court held that sites that are dry during a particular season or part of a season may under appropriate circumstances be subject to CWA jurisdiction. Exactly which circumstances render a site sufficiently aquatic, and which parts of the crystallizers and calcium chloride pits are considered "waters," remains to be determined by the trial court.

Nor does this case present a situation of waters that are totally isolated from navigable waters, their nonnavigable tributaries, or their adjacent wetlands, as petitioner would have it. The property at issue in this case is, by any estimation, an integral part of the San Francisco Bay estuary and wetlands system. The property is adjacent to both the navigable Newark Slough and the San Francisco Bay National Wildlife Refuge, connected to both by

culverts through which tidal waters flow.[4] Parts of the property have been found by the Ninth Circuit to be adjacent wetlands and that determination is now final. The endangered salt marsh harvest mouse, which inhabits only the salt marshes surrounding the San Francisco Bay, lives on the property.

The property, as part of the San Francisco Bay wetlands system, is on the Pacific flyway, "a chain of wetlands" stretching from the Arctic to South America which serves as the principal bird migration route along the west coast of the Americas. *See* Steinhart, *Tracks in the Sky: Wildlife and Wetlands of the Pacific Flyway* (1987) at 28. Wetlands around the San Francisco Bay are a particularly important part of the Pacific flyway:

> San Francisco Bay is the largest wintering and staging area along the coast. More than 70% of the shorebirds using the flyway stage or winter or breed there. "It's the major refueling and resting place for birds on the Pacific flyway," says Roger Johnson, manager of the San Francisco Bay National Wildlife Refuge. "There's no other place of any greater significance on the Pacific coast."

Id. at 30-31; *see* RT 1294. Estimates are that over 90% of San Francisco Bay's original wetlands have been lost to fill or development. *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcommittee on Environmental Pollution of the Senate Committee on Environmental and Public Works*, S. Hearing No. 99-278, 99th Cong., 1st Sess. 292 (1985) ("1985 Oversight Hearings").

In short, this case does not, as petitioner asserts, present the question whether CWA jurisdiction extends to ephemerally ponded areas that are totally isolated from navigable waters, their

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[4] Although the district court made no findings on the issue, evidence was presented indicating some hydrological connection between the waters on the crystallizers and calcium chloride ponds, and the tidal waters on the southern portions of the property. Government hydrologist Robert Coats observed tidal water on the crystallizers "on several occasions," and noted that "[d]uring intense and prolonged rainfall, water overflows from the depressions [on the crystallizers] and drains to Newark Slough." RT 1128; Exh. 535 at 2.

tributaries, and their adjacent wetlands. Indeed, the issue cannot yet be framed in a meaningful factual context because the district court has yet to determine how much, if any, of the crystallizers and calcium chloride ponds fall within CWA "other waters" jurisdiction.

B. The Purposes of the Clean Water Act Include Wildlife Protection and Wetlands Preservation

Petitioner asserts that the purpose of the CWA is "to attempt to restore the purity of the national waters, not to protect interstate wildfowl or endangered species." Pet. at 11. Petitioner is wrong. As the Act itself states, its objective is to restore and maintain not just the chemical and physical integrity of the nation's waters, but also their "biological integrity." 33 U.S.C. § 1251(a). The goal set forth in the Act is to achieve a water quality "which provides for the protection and propagation of fish, shellfish, and wildlife. . . . " 33 U.S.C. § 1251(a)(2). This central purpose is echoed throughout the Act. *See e.g.*, 33 U.S.C. §§ 1312(a), 1313(d)(1)(B), 1321(b) and (d), 1326(a), 1330(a), (b) and (k), 1343(c)(1)(A), and 1344(c).

Because wetlands provide vital habitat for a wide array of wildlife, particularly a disproportionate number of endangered species, wetlands preservation and wildlife protection go hand in hand. Over half of the fish and amphibian species listed as threatened or endangered, as well as 31% of threatened or endangered birds and reptiles and 15% of mammals, are associated with wetlands. Mitsch & Gosselink, *Wetlands* (1986) at 398-99. Moreover, wetlands serve a number of other ecosystem purposes, such as flood mitigation and aquifer recharge, which affect hydrological cycles regardless whether the wetland is "isolated" or not.

The legislative history of the CWA confirms that wetlands protection is an important purpose of the Act. As Senator Muskie stated during the debate on the 1977 amendments:

> There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage . . . . The wetlands and bays, the estuaries and deltas are the Nation's most biologically active areas . . . . They are

> a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

123 Cong. Rec. 26720 (Aug. 4, 1977). And, as this Court noted in *Riverside Bayview*, the inclusion in the 1977 amendments of a provision authorizing a $6 million appropriation to complete a "National Wetlands Inventory" "reflects congressional recognition that wetlands are a concern of the Clean Water Act . . . ." 474 U.S. at 139. In addition, during the 1985 Senate Oversight Hearings on Section 404, when an Army Corps official asserted, as petitioner does herein, that the CWA was not a wetlands protection law, the senators responded vehemently, affirming that to the contrary the congressional intent *was* to protect wetlands.[5] In fact, the senators emphasized that the intent was to protect all wetlands, including so-called "isolated" wetlands that were not connected to navigable waters or their tributaries. *1985 Oversight Hearings* at 113-116, 121, 172.

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[5] Senator Stafford stated:

> it was the intent of the Congress that wetlands are important and are to be protected under section 404 of the Clean Water Act. For an agency as important to this task as the civilian arm of the Army Corps of Engineers to hold otherwise is to frustrate the very goals of the act.

1985 Oversight Hearings, at 102.

Senator Mitchell also emphasized these purposes of the CWA:

> [Section 404] of the Act was intended by Congress to be one of the most important regulatory tools to stem the loss of wetlands. Unfortunately, it has not done so.
>
> Few Americans would disagree that wetlands are of national importance. Waterfowl and other water birds are dependent on wetlands throughout their life cycles, as are many fur-bearing animals. It is estimated nearly two-thirds of the fish caught by American commercial fishermen are dependent on estuarine areas and associated wetlands. These areas also buffer the effects of storms, purify water, aid in ground water recharge, and provide substantial flood control.

Id. at 105. *See also* remarks of Senator Chafee, *Id.* at 96.

C. Congress Intended To Assert Clean Water Act Jurisdiction Over All Waters Whose Degradation Could Affect Interstate Commerce

Petitioner's argument that the Ninth Circuit's decision is legally erroneous is built upon a flimsy cardhouse of unsupportable claims. Most fundamental among these is petitioner's assertion, without any support in the language or the legislative history of the CWA, that in the CWA "[f]rom first to last, the [congressional] preoccupation was with navigability." Pet. at 15. As respondents will demonstrate however, Congress did not wish jurisdiction under the CWA to be restricted on the basis of any reference to navigability.

Petitioner is also wrong that asserting CWA jurisdiction to the full extent permitted by the Commerce Clause was a brand new expansion of jurisdiction instituted by the Army Corps and EPA for the first time in 1985, without the knowledge or support of Congress. A review of the pertinent legislative history and regulations demonstrates that the federal agencies had since 1975, in response to court decisions and the urging of Congress, asserted jurisdiction over all waters the use, degradation or destruction of which could affect interstate commerce. Such waters, not surprisingly, include waters that provide habitat for migratory birds and endangered species.

Indeed, the history of CWA enforcement shows that the Corps never overstepped its congressional mandate; to the contrary, the Corps consistently was reluctant to assert its jurisdiction to the full extent intended by Congress, only doing so when Congress and the courts took it to task for its failure to effectuate the congressional intent. The explicit reference to migratory birds and endangered species was inserted in the preamble to the 1986 Corps regulations not because the Corps wanted to expand its jurisdiction but rather in direct response to adamant pressure from senators who expressed concern during the 1985 oversight hearings that the Corps was not enforcing the CWA broadly enough.

1. The 1972 Clean Water Act, The *Callaway* Decision, And The 1975 Interim Final Regulations

Congress formulated a broad definition of "navigable waters" to facilitate accomplishment of the CWA's far-sighted objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The final version of the CWA, unlike the original House and Senate versions, eschewed references to navigability in establishing the jurisdictional sweep of the Act, instead defining "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). *See* S. 2770, 92nd Cong., 1st Sess. § 502(h); H.R. 11896, 92nd Cong., 2d Sess. § 502(8). As this Court noted in *Riverside Bayview*, 474 U.S. at 133, the legislative history of the 1972 Act "makes it clear that the term 'navigable' as used in the Act is of limited import."

The Conference Report on the bill explained the omission of the word "navigable" from the definition of navigable waters as follows:

> The conferees fully intend that the term "navigable waters" be given the *broadest possible constitutional interpretation* unencumbered by agency determinations which have been made or may be made for administrative purposes.

S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); *see* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972). In presenting the Conference version of the Act to the full House, Congressman Dingell further explained that, for purposes of the Act, navigable waters

> means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in the laws .... The authority of Congress over navigable waters is based on the [commerce clause] .... No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.

118 Cong. Rec. 33756-57 (1972).

Courts have consistently interpreted the scope of CWA jurisdiction in the broadest constitutional manner. In 1975, the District Court for the District of Columbia invalidated the Army Corps CWA regulations then in effect on the grounds that they unlawfully restricted CWA jurisdiction by reference to navigability. *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975). In *Callaway*, the court held that in enacting the CWA, Congress

> asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.

Id.

In response to *Callaway*, the Corps published interim final regulations in 1975 which greatly broadened the scope of its regulatory activities under the CWA. 40 Fed. Reg. 31320 (1975); 33 C.F.R. § 209.120(d)(2). Those regulations included in the definition of "waters," inter alia, intrastate waters used for activities involving interstate commerce and

> [t]hose other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of *intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters* identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer.

40 Fed. Reg. at 31324-25 (emphasis added). While the 1975 regulation listed certain of the intrastate waters whose condition affected interstate commerce (40 Fed. Reg. at 31324), the preamble to these regulations was careful to state that:

> *this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily established by the listing of a broad category.* The 1975 regulation, therefore, gave the District Engineer authority to assert jurisdiction over "other waters", such as intermittent rivers, streams, tributaries and perched wet-

> lands, to protect water quality. Implicit in this assertion of jurisdiction over these other waters was the requirement that some connection to interstate commerce be established, even though that requirement was not clearly expressed in the 1975 definition.

42 Fed. Reg. 37122 at 37128 (1977) (emphasis added).

Thus, the 1975 interim regulations responded to the *Callaway* decision by acknowledging that the CWA could extend to all waters whose condition could affect interstate commerce. The regulations did not attempt to spell out every conceivable type of water whose condition could affect interstate commerce. Rather, they listed a few of the obvious categories of such waters and gave wide discretion to the District Engineer to assert jurisdiction over any other waters with some connection to interstate commerce. In sum, the only waters apparently excluded from jurisdiction under these regulations were other waters which were not adjacent to navigable waters and which were not related at all to interstate commerce.

2. Post-*Callaway* Congressional Consideration Of The Corps Regulations And The Extent Of Jurisdiction Under The Clean Water Act

The Congressional debate leading up to the 1977 amendments to the CWA focused on perceived problems relating to the expanded jurisdiction set forth in the 1975 Corps interim final regulations.[6] In particular, although the Corps proposed to require

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[6] *See* Testimony of Senator Dole, *Hearings Before the Senate Committee on Public Works on Section 404 of the Federal Water Pollution Control Act Amendments of 1972*, 94th Cong., 2d Sess. (1976), p. 34-36 (noting broad sweep of Corp's regulatory jurisdiction after *Callaway* encompasses "most waters in the United States"); Testimony of Senator Domenici, *Id.* at 156 (*Callaway* interprets Section 404 to apply to "all waters"); Statement of Senator Bentsen, *Id.* at 561-62 (under *Callaway*, Corps will exercise jurisdiction "on nearly every body of water in this country"); Statement of Senator Hansen, *Id.* at 563 (pursuant to Section 404, Corps "has jurisdiction over almost all waters of the United States"); Letter submitted by Senators Hart, Moss, and Weicker, *Id.* at 564 (regulatory authority under Section 404 is "broad" and includes

section 404 permits under all circumstances, Congress was united in determining that amendments to the Act should ensure that normal farming, ranching, and forestry activities should be exempted from section 404 permitting requirements. Absent amendments to the CWA, these activities would have been subject to permitting requirements as a result of the expanded Corps jurisdiction embodied in the new regulations.

Two different solutions to this problem were proposed. The Senate Committee on Environment and Public Works proposed amendments which retained the broad scope of jurisdiction specified in *Callaway* and the new regulations, but exempted normal ranching, agricultural activities, and silvicultural practices from permitting requirements. *See* S. Rep. No. 370, 95th Cong., 1st Sess. 10-11 (1977). The Senate Committee Report makes abundantly clear the Committee's intent to leave undisturbed those provisions in the Act extending jurisdiction as far as the constitution allows:

> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest possible constitutional extent .... Restriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve .... The committee amendment does not redefine navigable waters.

Id. at 75.[7]

"marshes, potholes, and other waterfowl nesting areas"); Statement of Senator Long, *Id.* at 565 (after *Callaway*, Corps has extended its regulatory program over "almost everything that is wet," including "lakes over five acres in area even if they are completely landlocked and privately owned"); Statement of Senator McClellan, *Id.* at 578 (after *Callaway*, Corps has expanded its regulatory program to include "all waters of the United States"); Statement of Senator McGee, *Id.* at 579 (*Callaway* effects an "extremely broad definition of 'navigable waters'" which includes "practically every body of water").

[7] The Committee bill received broad support on the floor of the Senate. Senator Hart spoke of the importance of maintaining the Clean Water Act's protection of "all of the elements of [water] systems," including "small streams, marshes, wetlands, and swamps." 123 Cong.

A minority in the Senate proposed a different solution to the problem. This minority rallied around a substitute to the Committee bill proposed by Senator Bentsen which would have greatly narrowed the scope of Corps jurisdiction under the Act by redefining navigable waters to mean only traditionally navigable waters and adjacent wetlands. A long debate over the Bentsen substitute ensued, during which the membership of the Senate displayed an intimate familiarity with the 1972 enactment, the *Callaway* decision, and the Corps' 1975 interim final regulations which defined navigable waters as broadly as the constitution would allow. 123 Cong.Rec. 26710-28.[8]

Rec. 26713 (August 4, 1977). Senator Stafford spoke of the "comprehensive jurisdiction over the Nation's waters to control pollution" which was effected by the 1972 enactment, and stated that "[a]fter extensive deliberation, the committee amendment rejects the redefinition of navigable waters." 123 Cong Rec. 26714. Senator Chafee rose to warn of the dangers inherent in any attempt to narrow the scope of the Corps' regulatory jurisdiction under Section 404. 123 Cong.Rec. 26716. Senator Baker stated that "[a] fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes" and asserted that "[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition." 123 Cong. Rec. 26718.

[8] As with the 1976 Oversight Hearings, the comments of numerous senators indicate their understanding that absent an amendment reducing the scope of Corps jurisdiction under the Act, the Act's jurisdiction would apply to all waters whose use or condition affects interstate commerce. *See* Statement of Senator Bentsen (under the Committee's amendment "[t]he [section 404] program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies"; the thrust of the Bentsen amendment is "dramatically cutting the size. . .of the present program"), 123 Cong. Rec. 26711-12; Statement of Senator Hart ("if [the Bentsen] amendment is adopted it will remove 98 percent of all the rivers, streams, and lakes from the protection program which the Congress has adopted. It will remove 85 percent of the wetland areas of this country from this kind of necessary national and Federal protection."), 123 Cong. Rec. 26713; Statement of Senator Muskie (speaking in support of the Committee proposal) ("we have to care about these marshes above the high water mark and about our inland marshes. It is also important for

Ultimately the Bentsen substitute was defeated. 123 Cong.Rec. 26728. Thus, the Senate expressly rebuffed an attempt to limit the scope of waters which were subject to the Corps' regulatory authority under the CWA. The fact that the Senate spurned the proposed narrowing amendment to the CWA with full knowledge of the judicial decisions construing the Act and of the manner in which the Act was being implemented by the Corps is particularly significant. See *Riverside Bayview*, 474 U.S. at 137-38.

After the House and Senate passed their respective bills to amend the CWA, a Conference Committee was convened. The conferees decided to retain the comprehensive jurisdictional sweep of the CWA and to repudiate the narrowing of Section 404 jurisdiction which had been rejected earlier in the Senate but had passed in the House. *See* H.R. 3199, 95th Cong, 1st Sess. 16 (1977).

In presenting the Act which emerged from conference to the full Senate, Senator Muskie proudly stated that "[t]he conference bill follows the Senate bill by maintaining the full scope of Federal regulatory authority over all discharges of dredged or fill material into any of the Nation's waters." 123 Cong. Rec. 39187 (December 17, 1977). Likewise, Senator Baker reiterated that "the conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional extent." 123 Cong. Rec. 39209. The Act, as reported by the Conference Committee, sailed through both the House and the Senate with near unanimous votes.

The language of the 1977 CWA amendments confirms that Congress understood that CWA jurisdiction reached to isolated

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those who are sportsmen to remember that *these wetlands provide the breeding and feeding areas for our migratory waterfowl and for furbearing mammals* and the spawning grounds and nursery areas for fish. *We must care about what happens to inland wetlands"),* 123 Cong. Rec. 26716 (emphasis added); Statement of Senator Tower ("If the current definition of navigable water is allowed to stand, it will mean that many day-to-day activities on lands that are wet, swampy, or poorly drained will require a permit"), 123 Cong. Rec. 26722.

waters whose condition affected interstate commerce. The amendments expressly omitted construction and maintenance of stock ponds and irrigation ditches, and maintenance of drainage ditches from coverage under section 404. *See* 33 U.S.C. § 1344(f)(1)(C). If petitioner were correct in its assertion that Congress intended that jurisdiction only reach to navigable waters, their tributaries, and adjacent wetlands, then such an exemption would have been unnecessary. Under petitioner's interpretation, it also would have been unnecessary for Congress to exempt normal agricultural, silvicultural, and ranching activities from section 404 permitting requirements, as these activities would not typically fall within the narrowed scope of jurisdiction proposed by petitioner.

Thus, both the congressional debate over the 1977 amendments and the language of the amendments clearly demonstrate that Congress intended to confirm the approach taken by the courts (evidenced by the *Callaway* opinion) and by the Corps in applying CWA jurisdiction as broadly as permitted under the commerce clause.

3. Subsequent Corps Regulations

The Corps' 1975 interim final regulations were superceded by final regulations effective July 19, 1977. The Senate debate over the pertinent provisions of the 1977 CWA amendments occurred shortly after these regulations went into effect, and at least some senators were aware of these regulations. *See* 123 Cong. Rec. 26718 (1977) (statement of Senator Baker). The preamble to these regulations states:

> We have interpreted the guidance contained in this legislative history to be consistent with the Federal Government's broad constitutional power to regulate activities that affect interstate commerce as interpreted by the Supreme Court on several occasions.

42 Fed. Reg. 37127 (citations omitted). In addition to navigable waters, tributaries to navigable waters, interstate waters, and adjacent wetlands, the 1977 Corps regulations included the following category in its list of waters under CWA jurisdiction:

> (5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[9]

42 Fed. Reg. 37144 (1977). This regulation did not include any specific examples of other waters wherein the interstate commerce nexus was satisfied. The preamble notes that rather than substantively changing the definition of "navigable waters" set forth in the 1975 interim regulations, it merely "consolidated" the 1975 list of categories to "assist in clarifying those waters that are subject to the Section 404 program." 42 Fed. Reg. 37127.

With respect to their definition of "navigable waters," the 1977 regulations are virtually the same as the 1986 regulations which have governed the instant case.[10] Although the 1986 regulations contain some examples of other waters whose condition could

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[9] [This footnote is included in the regulation as fn.2.] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." . . . *Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious* or where the location or size of the waterbody generally may not require regulation, through individual or general permits to achieve the objective of the Act. . . . (emphasis added).

[10] The 1986 regulations define "waters of the United States," in pertinent part, as:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .

33 C.F.R. § 328.3(a)(3).

affect interstate commerce, both the preamble and the history of the regulations clarify that these examples are not intended to be all-inclusive.

4. 1985 Congressional Oversight Hearings

In 1985, a controversy developed over the Corps' regulation of wetlands, and particularly isolated wetlands, under section 404. Members of the Senate Environment and Public Works Committee conducted hearings to determine whether the Army Corps and EPA were exercising CWA jurisdiction as broadly as Congress intended, or whether, as the senators suspected, the Corps was "dragging its heels" on wetlands protection. *1985 Oversight Hearings* at 102. Senator Stafford described the problem as follows:

> [T]he EPA seems to be allowing the corps to exclude from section 404 coverage hundreds of thousands of acres of valuable swamps and bogs that are undeniably waters of the United States.

Id. In these hearings, the senators repeatedly confirmed that the CWA should be given the broadest possible interpretation consistent with the commerce clause. Senator Mitchell warned Robert Dawson, Acting Assistant Secretary of the Army, not to unduly restrict Corps CWA jurisdiction:

> I think there is a need for a clear national policy. And as you devise that policy, I strongly encourage you to look at the law expressly set forth by the court in the *Callaway* case, to which I referred earlier, and which I repeat. The court said that Congress, in enacting the 1972 law, had asserted Federal jurisdiction over the Nation's waters to the maximum extent permissible under the commerce clause of the Constitution.
>
> The act has been dealt with by Congress in the interim. Congress has not in that time sought in any way to repudiate or contravene or contradict that court's statement. So you may assume under well established principles of judicial construction that that is a correct statement of the intent of Congress, known to and acquiesced by Congress since then. And the national policy, which it seems to me you must

> enunciate, must by law incorporate that to the extent possible.

Id. at 128-29; *see also id.* at 95-6, 101-102, 113-115, 121-123, 172, 193, 207.

The senators evinced particular concern that the Corps was failing to enforce section 404 in connection with isolated wetlands. Over and over again, the senators emphasized that the CWA was intended to protect all wetlands, including isolated wetlands. *See, e.g., id.* at 95-6, 101-105, 113-116, 120-123, 194. Senator Mitchell stated:

> Any reading of the background of this must inevitably lead to the conclusion that you should ascertain and implement jurisdiction over isolated wetlands. . .

Id. at 172. In fact, it was at these hearings where senators questioned whether the Corps understood that use of isolated wetlands by migratory waterfowl would establish the requisite interstate commerce connection such that there was CWA jurisdiction. Senator Mitchell posed the issue to Corps official Dawson:

> Do you agree that isolated wetlands are within the corps' section 404 jurisdiction where they are used by migratory fowl, waterfowl, which establishes the interstate commerce basis for jurisdiction?

Id. at 115.

Subsequently, EPA submitted a written statement responding to the subcommittee's concerns regarding isolated wetlands. This statement for the first time spelled out in detail the federal agency's enforcement policies with respect to non-navigable isolated waters. "The simple answer" to the question of jurisdiction over these waters, stated EPA, "is that all such waters are regulated if their use, degradation or destruction would or could affect interstate or foreign commerce." *Id.* at 189. EPA continued:

> The more difficult issue is defining the criteria to be used in determining whether or not there is a connection to interstate or foreign commerce, and how such criteria would be applied

> to individual lakes, ponds and wetlands . . . It would be virtually impossible to delimit all possible combinations of circumstances which would affect interstate or foreign commerce. We fear that in trying to do so we might overlook some possibilities and inadvertently narrow jurisdiction. Since the legislative history of the Clean Water Act makes clear that Congress intended to extend its jurisdiction to the maximum extent permissible under the Commerce Clause of the Constitution, I am sure you share our concern with this possible outcome.

Id. at 189. With that proviso, EPA went on to list circumstances which provided the necessary interstate commerce nexus, emphasizing that the list was not "all inclusive." The list included the following:

- waters used as habitat by birds protected by Migratory Bird Treaties. This represents a national interest of very nearly the first magnitude, as it can be protected only by national action in concert with that of another nation.

- waters used as habitat by other migratory birds which cross state lines

- waters which are habitat for endangered species, to preserve the possibility of interstate movement of persons, such as scientists, who come to a state to observe and study these species

Id. at 189-90.

Senator Mitchell expressed concern that this definition excluded waters which *could be* used as habitat for migratory birds or endangered species. *Id.* at 169-71. No one—neither the senators nor the Corps nor EPA—questioned that use of waters by migratory birds or endangered species established the requisite interstate commerce connection. The debate centered only on whether *potential* use established enough of a connection. A subsequent EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters was prepared describing the agency's position as consistent with that of Senator Mitchell. *See* Exh. 575. That memorandum was forwarded by the Corps to its field offices

with a cover memorandum stating that the memo "is consistent with our regulations at 33 C.F.R. 323.2(a)(3)." Exh. 575 at 2.

D. The Ninth Circuit's Decision In This Case Is Consistent With Pertinent Case Law

Notably absent from the petition in this case is any assertion that the Ninth Circuit decision is inconsistent with any court decisions either of this Court or of other circuit courts. Indeed, the Ninth Circuit decision herein is fully in line with a long line of case law interpreting the CWA. Federal courts have unanimously held that the scope of Corps' regulatory jurisdiction under section 404 of the CWA extends as far as the commerce clause constitutionally permits.[11]

This Court's decision in *Riverside Bayview* is most instructive as that case is very similar to the case at hand. In *Riverside Bayview*, a unanimous Court found that it was permissible under the CWA for the Corps to assert jurisdiction over freshwater wetlands that were adjacent to navigable waters, but whose moisture did not come from those adjacent waters. The Court noted that jurisdiction over such wetlands is reasonable even where there are such adjacent wetlands that are of no great importance to the adjacent aquatic environment, because as a general proposition it was reasonable for the Corps to conclude

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[11] *See, e.g., United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983), *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983), *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979), *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978), *People of the State of California ex rel. State Water Resources Control Bd. v. E.P.A.*, 511 F.2d 963, 964 n. 1 (9th Cir. 1975), *rev'd on other grounds sub nom. E.P.A. v. State Water Resources Control Bd.*, 426 U.S. 200 (1976), *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974), *United States v. Ciampitti*, 583 F.Supp. 483, 491 (D.N.J. 1984), *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F.Supp. 278, 285-86 (W.D.La. 1981), *aff'd in part and rev'd in part on other grounds*, 715 F.2d 897 (5th Cir. 1983), *Sun Enterprises, Ltd. v. Train*, 394 F.Supp. 211, 223-224 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2nd Cir. 1976), *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975), *United States v. Holland*, 373 F.Supp. 665, 671-73 (M.D.Fla. 1974).

that all adjacent wetlands may function as integral parts of the aquatic environment, regardless of the source of their moisture. 474 U.S. at 135, n.9. The Court pointed out that if a wetland is not important to the aquatic environment, the Corps can always simply issue the requested permit. *Id.*

The Court also considered carefully the 1977 congressional debate over the CWA amendments. The Court found it highly significant that although the scope of asserted Corps wetlands jurisdiction was specifically brought to Congress' attention, Congress rejected measures proposed to limit Corps jurisdiction:

> Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.

474 U.S. at 137 (citations omitted).

The Court's reasoning in *Riverside Bayview* applies precisely to this case. As the discussion in section II(C), supra, demonstrates, Congress was well aware that both courts and the Corps had interpreted CWA jurisdiction as extending to the maximum extent permissible under the commerce clause. Indeed, it was this broad assertion of jurisdiction over wetlands and isolated waters that had prompted such vigorous debate over whether to reduce the scope of jurisdiction. In the end, however, Congress deliberately chose to retain the broad scope of jurisdiction, rejecting outright the proposed amendment that would have eliminated aquatic areas such as those at issue in this case from a definition of "waters of the United States."

Petitioner's assertion that the Ninth Circuit "ignored" the Fourth Circuit's unpublished ruling in *Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989) (Table), "thereby creating a square conflict," is wrong. The Ninth Circuit did not "ignore" *Tabb Lakes*, and no conflict among the circuits was created.

In *Tabb Lakes*, the court set aside the Corps' finding of jurisdiction in a particular case because the Corps had improperly relied upon an internal 1985 Corps memorandum in making its jurisdictional determination. The court explicitly did not reach the question whether the Corps may, consistent with the CWA, assert jurisdiction over waters which provide habitat for migratory birds or endangered species.[12] 715 F.Supp. at 729. The Ninth Circuit did not discuss *Tabb Lakes* because petitioner never made the argument made in that case—that the Corps followed improper procedures in asserting "other waters" jurisdiction over parts of the Leslie property.

III. THE NINTH CIRCUIT DECISION DOES NOT, AS PETITIONER CLAIMS, PROHIBIT DEVELOPMENT ON VAST AMOUNTS OF LAND

Petitioner goes so far as to assert that the Ninth Circuit's decision accomplishes "a radical transformation of private property into public land," potentially withdrawing tens of millions of acres[13] of land from development. Pet. at 8, 9. Petitioner's theory is apparently based on its unwarranted presumption that its own chance for getting a section 404 permit from the Corps is "virtually nil." Pet. at 10.

This alarmist theory has no basis whatsoever. Petitioner's suggestion that takings may in the future occur is mere speculation, and in any event offers no support for a narrow reading of the CWA. Petitioner's argument was firmly rejected by the Court in *Riverside Bayview:*

> [T]he possibility that the application of a regulatory program may in some instances result in the taking of individual

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[12] The "grave doubts" expressed by the district court in *Tabb Lakes* were voiced with respect to whether providing habitat for migratory birds establishes a sufficient nexus to interstate commerce, *not* whether Congress intended CWA jurisdiction to extend as far as permitted under the commerce clause. 715 F.Supp. at 729.

[13] The U.S. Fish and Wildlife Service estimates the number of "isolated" wetlands at 13 million acres, not "tens of millions of acres." *1985 Oversight Hearings* at 121, 194.

> pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. Under such circumstances adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty [citation omitted]; it merely frustrates permissible applications of a statute or regulation.

474 U.S. at 128. *See also Hodel v. Virginia Surface Mining & Reclamation Assn.* 452 U.S. 264, 293-297 (1981).

Furthermore, there is no reason to presume that development will be stopped on property within Corps jurisdiction. The Corps grants most permit applications, including applications for non-water-dependent projects. In Fiscal Year 1984, for example, the Corps issued 5,859 individual permits and denied 346 (one out of eighteen). *1985 Oversight Hearings* at 66 (testimony of Robert Dawson, Acting Assistant Secretary of the Army).[14] Of the permits issued that year, approximately 1,200 were for non-waterdependent projects. *Id.* at 67. There is simply no basis for likening CWA jurisdiction to a denial of all development rights and an unconstitutional taking of private property.

Nor is petitioner correct in claiming that the Ninth Circuit decision will create additional problems in drawing the line between land and water. That problem has always existed. *See Riverside Bayview,* 474 U.S. at 132. Regardless of where on the spectrum from oceans to totally dry land you draw the line separating water from land, there will always be some potential fuzziness around that line. *See* Mitsch & Gosselink, *Wetlands* (1986) at 16. If, for example, the courts or Congress were to endorse petitioner's proposal that CWA jurisdiction extend only to navigable waters, their tributaries and adjacent wetlands, then one still must determine which waters are "navigable," what exactly constitutes a "tributary" and what is a wetland adjacent to

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[14] The statistics are similar for other years:

FY 1983: 6,760 permits issued, 373 denied;
FY 1982: 8,864 permits issued, 324 denied;
FY 1981: 8,350 permits issued, 291 denied.

Id.

such waters and tributaries. These questions are no easier than those posed by the current definition, which includes all waters the use, degradation or destruction of which could affect interstate commerce.

CONCLUSION

For the reasons stated herein, the Court should deny Leslie's petition for certiorari.

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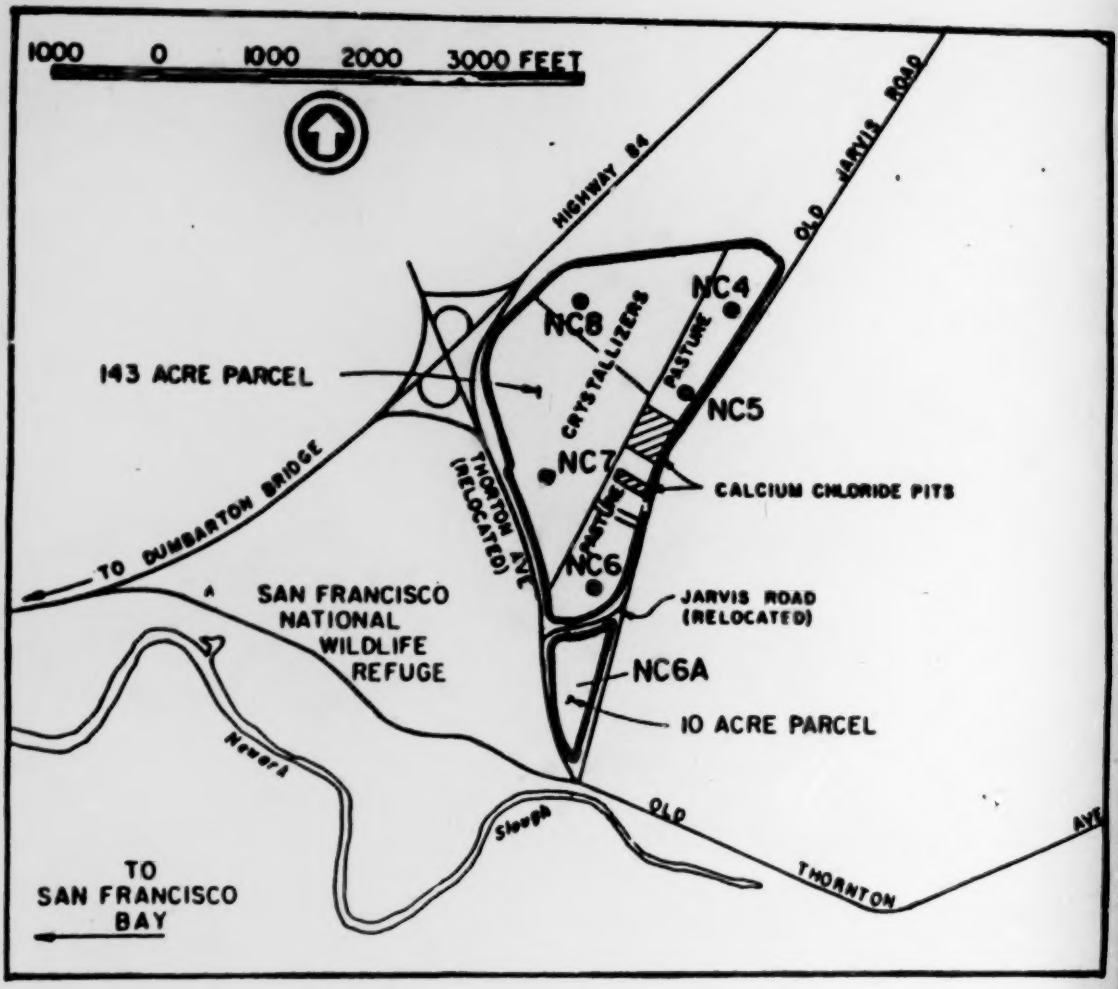
Appendix A


1000 0 1000 2000 3000 FEET
HIGHWAY 84
OLD JARVIS ROAD
NC8
NC4
CRYSTALLIZERS
PASTURE
143 ACRE PARCEL
NC5
NC7
CALCIUM CHLORIDE PITS
THORNTON AVE (RELOCATED)
PASTURE
TO DUMBARTON BRIDGE
NC6
SAN FRANCISCO NATIONAL WILDLIFE REFUGE
JARVIS ROAD (RELOCATED)
NC6A
10 ACRE PARCEL
Newark
Slough
OLD THORNTON AVE
TO SAN FRANCISCO BAY